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Supreme Court of the United States

OCTOBER TERM, 1952

No. 226

J. LAURITZEN,

Petitioner,

against

EVALD JOHANN LARSEN

Plaintiff-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

JAMES M. ESTABROOK,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

DAVID P. H. WATSON,
of Counsel.

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PETITIONER'S REPLY BRIEF

The plaintiff-respondent's brief is noteworthy for its avoidance of the point made by petitioner that the terms of the Jones Act were not intended by Congress to be applicable to a factual situation such as is presented here. It cites no authority and makes no argument to maintain its position that the facts involved here were such as to require the Court to take jurisdiction and allow the plaintiff-respondent to maintain an action in our courts under the Jones Act rather than relegating him to a recovery under the Danish law, the law of the flag, nor does his brief cite any authority to show that the Jones Act was specifically intended by Congress to cover injuries sustained abroad by a foreign seaman signing on a foreign ship in a United States port, or that it was intended to supplant the traditional "law of the flag" rule in such situations.

The Question Presented

The question presented to this Court on certiorari was set forth on page 5 of the petition of the petitioner. The petition based on this question was granted by this

Court on October 13, 1952 (132).* The question presented was restated on page 2 of the brief for the petitioner, dated November 25, 1952. Now, in the brief for the plaintiff-respondent, we find, not one question presented, but, on pages 1 and 2, five questions presented, none of which conform to the question on which this Court granted certiorari.

The decisions of this Court have made it clear that the consideration of a case presented to this Court on certiorari is limited to the questions specifically presented by the petition. In *General Talking Pictures Corp. v. Western Electric Co., et al.*, 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273 (1938), Mr. Justice Butler wrote as follows on page 177:

> "Our consideration of the case will be limited to the question specifically brought forward by the petition."

And then further at page 179, as follows:

> "One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue. *Crown Cork & Seal Co. v. Gutmann Co., ante*, p. 159. Petitioner is not here entitled to decision on any question other than those formally presented by its petition for the writ."

In like tenor is the decision of Mr. Chief Justice White in *Tyrrell, Admnx. of Tyrrell v. District of Columbia*, 243 U. S. 1, 37 S. Ct. 361, 61 L. Ed. 557 (1917), wherein the Chief Justice stated that it was the duty of this Court to dismiss a certiorari upon discovering that the question which induced the issuance of the writ did not arise in the record. To the same effect are *National Licorice Company v. The National Labor Relations Board*, 309 U. S. 350, 357, 60 S. Ct. 569, 84 L. Ed. 799 (1940) and *Furness, Withy & Co. v.*

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* References herein are to pages of the record unless otherwise indicated.

Yang-Tze Insurance Association, 242 U. S. 430, 37 S. Ct. 141, 61 L. Ed. 409 (1917).

If this Court were to consider the five questions presented on pages 1 and 2 of the plaintiff-respondent's brief, it would find quickly that those questions found no support in the record before this Court. The petitioner respectfully submits that this Court should limit its consideration to the question presented by the petitioner, as set forth on page 5 of the petition and as restated on page 2 of the brief for the petitioner, dated November 25, 1952.

The brief for the plaintiff-respondent, as well as the briefs of *amici curiae* in support of plaintiff-respondent have presented situations without basis in the record and in the question presented to this Court by the petitioner.

The first situation is the hypothetical case of a foreign shipowner operating ships under his foreign flag, but who maintains headquarters and residence here in the United States. The second is the case, also hypothetical, of a foreign or United States shipowner who seeks refuge from United States jurisdiction by operating his ships under an alien registry having no connection whatsoever with the actual nationality of the vessel or her owners. The third is the foreign shipowner who, while operating his vessels to and from our shores, uses various foreign affiliations as a smokescreen for his operations, and who, as a result, makes only absolutely minimum provisions for the sick and injured seamen aboard his vessels.

None of these three situations are found in the case at bar. Though these are situations which may indeed exist in some quarters, they do not exist in the case at bar and have been seized upon by the plaintiff-respondent in an effort to make this Court believe that the case at bar presents a similar picture, while at the same time admitting that the record is totally devoid of any such inferences and that the arguments and situations presented in the plaintiff-respondent's brief have gone beyond the facts of the record (page 9 of the brief for the plaintiff-respondent).

Justification for going beyond the facts of the record is sought by stating that the plaintiff-respondent has been prejudiced by the amended answer of the defendant, the petitioner herein, pleading the foreign law (page 12 of plaintiff-respondent's brief). With respect to any alleged prejudice to the plaintiff-respondent, it should be noted that counsel for the plaintiff-respondent consented on May 7, 1951 (10), to the service of this amended answer by the defendant, all pursuant to Rule 15 of the Federal Rules of Civil Procedure. Based on this consent of plaintiff's attorney, the filing and serving of an amended answer was allowed by the order of the Honorable Edward Weinfeld of the United States District Court for the Southern District of New York on May 11, 1951.

This amended answer is no more prejudicial now than it was when this consent was given.

No objection was raised at the pre-trial conference held September 26, 1951 (15), nor was this issue formulated in the pre-trial order, dated September 27, 1951, (15-16). Finally, this issue of American ownership was not raised by plaintiff-respondent when, by order on consent, he amended his complaint November 16, 1951 (18-19).

The plaintiff-respondent asks to go beyond the facts of the record on the grounds that the question of ownership, control and operation of the s/s Randa was not at issue in the trial of this case (page 9, plaintiff-respondent's brief). The petitioner agrees that such matters both were not at issue at the trial and are outside the record.

If the Court should, despite petitioner's authorities cited above, look beyond the record, petitioner then submits that counsel for the plaintiff-respondent was conscious of the question of American ownership, operation and control of the s/s Randa prior to the trial of the case. On November 21, 1951, 15 days before the opening date of the trial, a subpoena was served by plaintiff-respondent on petitioner's New York representative requiring him to attend and produce the following records:

"1. The itinerary of the s/s Randa embracing the 7th day of October, 1946, and the itinerary of the s/s Randa on her two previous voyages.

2. All documents indicating when the defendant became the owner of the s/s Randa, the name or names of the individuals or corporations from whom defendant purchased said vessel, and the consideration paid therefor.

3. A manifest of the cargo which the s/s Randa carried on the voyage embracing the 7th day of October, 1946, showing for whose account or accounts such cargo was carried.

4. The articles of employment signed by the plaintiff for the voyage embracing the 7th day of October, 1946, indicating where the various members of the crew joined the s/s Randa."

Pursuant to the mandate of this subpoena, the witness attended with these records.

The plaintiff-respondent did not call this witness either to produce the documents or to testify as to petitioner's supposed American control.

The plaintiff-respondent has the burden of proof as to the jurisdiction of the court, and it was necessary, for plaintiff-respondent either to rely on the American sign-on as bringing the case under the jurisdictional requirements of the Jones Act under the ruling of the United States Court of Appeals for the Second Circuit in *Taylor* v. *Atlantic Maritime Co.*, 179 F. (2d) 597, 1950 A. M. C. 352 (2nd Cir. 1950), cert. den. 341 U. S. 915, 71 S. Ct. 736, 95 L. Ed. 1350, or to prove American ownership under the rule of *Gerradin* v. *United Fruit Co.*, 51 F. (2d) 417, aff'd 60 F. (2d) 927 (2nd Cir. 1932), cert. den. 287 U. S. 642. Plaintiff-respondent, having chosen not to call the witness, thereby deliberately left the record barren as to any proof now deemed necessary as to American control. However, counsel's judgment was undoubtedly sound since if the witness had been called, his testimony would have been to the effect that the s/s Randa was a Danish vessel owned and

operated by petitioner, a prominent Danish shipowner with a large permanent staff in Copenhagen.

Furthermore, there was absolutely no fraud or deception. In the First paragraph of the complaint (4) it was alleged that "Defendant has a principal office for the transaction of business at 80 Broad Street, in the Borough of Manhattan, City and State of New York." This allegation was denied by the defendant in both his answer (8) and amended answer (11). No proof was submitted by the plaintiff in support of this allegation, as to which the plaintiff bore the burden of proof.

Now, at this late stage in the proceedings, plaintiff-respondent is trying to revive this issue by stating or intimating that the petitioner, the defendant below, is an American entity, operating vessels in the United States (plaintiff-respondent's brief, pages 3, 5, 11, 12, 13, 18, 50 and 59). As "proof", plaintiff-respondent and *amici curiae* have shown nothing more than that American agents have openly advertised the sailings of some of petitioner's vessels. None of this "evidence" is new. It was fully available at the time the issues were framed before the trial. Despite these public advertisements, which, of course, find no place in the record, absolutely no testimony was produced and there is nothing to prove petitioner was or is an American entity.

There is no showing of any such newly discovered evidence as would entitle plaintiff-respondent to a new trial.

The Facts

Some errors in the facts stated in plaintiff-respondent's brief should be noted.

1. The record does not indicate that the plaintiff-respondent was signed on "a vessel regularly engaged in the American Shipping Trade" (brief, p. 3). In fact, there is nothing in the record to indicate the movements of the

s/s Randa for any period whatsoever beyond the fact that the plaintiff-respondent signed articles to serve aboard her in New York on July 25, 1946 (pre-trial order, 16, 44, Defendant's Exhibit A, 45); that the s/s Randa called at various South American ports and arrived in Havana, Cuba, about the beginning of October, 1946 (26); that on October 7, 1946, the s/s Randa was still in Havana, Cuba (33, 34); and that the s/s Randa eventually got to New York (pre-trial order 16, Defendant's Exhibit A, p. 9, column 17, 44, 45).

2. There is no foundation in the record for the statement set forth under "Statement of Facts" on page 3 of plaintiff-respondent's brief to the effect that "flagrant abuses of our hospitality are being practiced by other allegedly foreign shipowners who conduct their business in the United States in the names of foreign corporations, flying the flags of still other foreign lands, as a device to evade the obligations of our laws." Such statement is but one of the many examples where the plaintiff-respondent has gone beyond both the limits of the record and the question before this Court.

3. Plaintiff-respondent has misstated the record on page 4 of his brief when he says that Defendant's Exhibit A (44, 45) establishes a voyage from and to New York in that two seamen listed thereon, who signed on with plaintiff-respondent in New York, also signed off in New York on October 14, 1946. It is also stated that although the vessel flew the Danish flag, not one seaman listed signed on or off in Denmark.

Plaintiff-respondent's counsel did not notice that only a part of the articles are printed, as may be seen by the fact that only pages 8 and 9 were reproduced (upper left and upper righthand corners of second page of Defendant's Exhibit A). Also, as shown in column 10 of pages 8 and 9 of Defendant's Exhibit A, while most crew members signed on for an indefinite period, one man on those pages

reproduced, signed on for a voyage only from Havana to the United States (Defendant's Exhibit A, column 10, 4 lines from bottom, 44, 45). There is, in fact, nothing in the record to indicate the extent of the "voyage" for which the plaintiff-respondent signed on beyond the terms of the articles which called for a voyage to "South America and other places", and the pre-trial order which stated that the plaintiff signed articles and shipped from the port of New York for a voyage to South America and other places (16). In addition, the plaintiff-respondent testified (47) that he was bound to serve aboard the vessel for an indefinite period. This Court's attention is called to the exchange between the Trial Judge and counsel for the plaintiff-respondent (48-49) where the Trial Judge indicated that the wording of the pre-trial order did not deal with the "scope of the voyage", but merely stated the fact that the vessel finally got to New York.

The fact that two seamen listed on pages 8 and 9 of Defendant's Exhibit A, who signed on board the vessel in New York at the same time as Larsen, also signed off in New York, in no way indicates that this was a voyage from and to New York. The terms of the articles signed by these two seamen made it possible for them to sign off the vessel merely by giving 7 days' notice of such intention to the master (Defendant's Exhibit A, 44, 45), and under such terms, therefore, any seaman could have signed off at *any port*, regardless of the port at which he signed on.

4. The plaintiff-respondent has stated on page 5 of his brief that the Trial Court ruled and the jury found that there was no valid agreement to be bound by Danish law. While it is true that the Trial Court ruled that the Danish law was not to be given effect (113, 114), it is not true that the jury found that there was no valid agreement to be bound by Danish law, for the Trial Court refused to permit this question to be placed before the jury, and refused to permit the jury to consider any questions whatsoever involving the applicability or the effect of the Danish law (113, 114).

5. In stating that plaintiff-respondent received no benefits under the Danish law and did not elect to receive any such benefits (p. 4 of plaintiff-respondent's brief), plaintiff-respondent has ignored his own testimony, Defendant's Exhibit D (51), and also Defendant's Exhibit C (20, 21, 89), all of which substantiate the fact that plaintiff-respondent was duly cared for until he was able to return to work and did, in fact, receive the benefits due him under the Danish law. Nor was there, as pointed out above, any finding by the jury that the plaintiff-respondent did not receive full maintenance or compensation for his injury in accordance with the terms and provisions of such Danish law.

6. The alleged "facts", referred to in the brief of *amici curiae* on behalf of Petter D. Pedersen, et al. are totally outside the record and find no parallel application whatsoever to the record herein or the question presented to this Court on certiorari.

The Law

1. Point I of the brief for the plaintiff-respondent (pp. 9-24) alleges facts and issues "beyond the bare facts of the record". Similar alleged facts, equally unsupported by the record, may be found throughout this brief and throughout the briefs *amici curiae* calling for the affirmance of the decision of the United States Court of Appeals for the Second Circuit. In order that this Court might not be misled by these statements, brief comment will be made thereon.

Plaintiff-respondent, instead of relying on testimony in the record, has made a claim for the first time before this Court based only on advertisements and telephone listings that petitioner is an American entity operating and controlling its vessels from New York alone.

However, Lloyd's Register of Shipping for 1946-7, the year in which the plaintiff-respondent served aboard the

s/s Randa, indicates that J. Lauritzen of Copenhagen owned 24 vessels. Of these, only four were advertised in the services running to Colombia, Ecuador, Peru and Chile (Exhibit 2 on p. 18 of the brief *amici curiae* on behalf of Petter D. Pedersen, et al.) One of these four at that time was the s/s Randa.

2. Reference is made on page 11 of plaintiff-respondent's brief to the report of a Maritime Commission hearing on a Grace Line—West Coast Line pooling agreement, allegedly reported at 1940 A. M. C. 1515.

It should be noted that 1940 A. M. C. 1515 is not the report of the United States Maritime Commission, but is merely an editor's headnote on such report. The report is set out in full at United States Maritime Commission Reports, Vol. 2, page 372, and is entitled: *In Re Grace Line, Inc. and West Coast Line*, Pooling Agreement No. 5893, as amended.

This report indicates that the pooling agreement was entered into on May 19, 1937, and was subsequently approved under Section 15 of the United States Shipping Act of 1916 on July 1, 1937. The question before the United States Maritime Commission was limited to, as set forth on page 374, "whether under the existing extraordinary and emergent conditions the pooling agreement should be disapproved or modified and not whether any party thereto should recover damages". The extraordinary conditions and emergent conditions referred to the fact that between April 10, 1940, and the date of the hearing, the Danish vessels of J. Lauritzen, which formed a part of the pool with the Grace Line vessels, were immobilized as a result of the German invasion of Denmark. The sole question before the Commission was whether, by reason of the immobilization of the Danish vessels, the Grace Line was bearing an undue share of the burden of maintaining this joint service. There was no finding in the majority or minority reports that the pooling agreement was in any way detrimental to the interests of the commerce of the United States, as suc-

cinctly pointed out by Commissioner Truitt in his dissenting opinion at page 386. The closing paragraph of the majority report of the United States Maritime Commission reads as follows (p. 381):

> "We conclude and decide that under the changed circumstances disclosed of record, Pooling Agreement No. 5893, as amended, is unjustly discriminatory and unfair *as between the carriers party thereto.*" (Emphasis supplied.)

In fact, the report of the United States Maritime Commission, above referred to, makes it clear that the pooling agreement had been openly arrived at and officially approved by the United States authorities. The approved relationship existing between J. Lauritzen and Wessel Duval & Co., Inc. in 1940 in the sharing of profits from time-chartered American flag vessels (2 U. S. M. C. 378) is no proof as to the *modus operandi* of Danish flag vessels in 1946.

3. Plaintiff-respondent refers to the Shipowners Liability Convention, 54 Stat. 1693, proclaimed September 29, 1939 (page 16 plaintiff-respondent's brief). Petitioner submits that such a convention is the proper multilateral means approved by Congress of determining shipowners' liability. Denmark, however, is not a party to this convention.

4. Reference to agents for foreign vessels in United States ports (plaintiff-respondent's brief, page 18) as an alleged reason for applying American statutes to the internal affairs of foreign vessels, fully overlooks the point that American vessels trading to foreign ports use agents and subsidiary corporations in these foreign ports, without which operations would be commercially impossible; but that does not mean that these American vessels in international trade become any less American just because they are required by the nature of their business to employ agents in their foreign ports of call.

5. Counsel for plaintiff-respondent, under Point II on pages 29 and 31 cites the cases of *Patterson* v. *Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002 (1903) and *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348, 40 S. Ct. 350, 64 L. Ed. 607 (1919) in support of the plaintiff-respondent's position. Both these cases were fully discussed in petitioner's brief, dated November 25, 1952, wherein it was pointed out that both involved the constitutionality of the United States statutes which Congress had expressly specified should be applicable to foreign vessels in our ports. As was pointed out in that brief, these cases find no parallel in the one at bar, since in the Jones Act and its legislative history we find no indication of an intent on the part of Congress or in the language of the section itself that its terms should be applicable to alien seamen aboard foreign vessels who are injured in foreign ports. This misinterpretation of *Strathearn S. S. Co.* v. *Dillon, supra*, is pointed up by the statement of counsel for plaintiff-respondent at page 31 that "this Court gave a foreign seaman signing on a foreign vessel in a foreign port the right to sue in our courts for relief". It is respectfully submitted on behalf of the petitioner that this Court did not give the foreign seaman the right to sue. That right was given by Congress in Section 4 of the Act of March 4, 1915, C. 153, 38 Stat. 1164, 1165, Title 46, U. S. C. § 597, wherein it was stated:

> "* * * *and provided further*, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement".

The ruling of this Court in *Strathearn S. S. Co.* v. *Dillon, supra*, upheld the constitutionality of this provision. The ruling of this Court did not extend the application of the section beyond the language provided by Congress. This is an important distinction to bear in mind. As has been pointed out, petitioner is not asking this Court to find in the face of the wording of the Jones Act, but submits that Section 20 of the Act of March 4, 1915, as amended by Sec-

tion 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007, Title 46, U. S. C. § 688, takes its place with those sections of the 1915 Act which were not extended to foreign vessels and does not belong in the same category with Sections 4, 11 and 14 of the Act of 1915, which were, as has been pointed out fully in petitioner's brief, specifically extended to apply to foreign vessels under certain stated conditions.

6. On page 31 of plaintiff-respondent's brief, counsel has misunderstood and misinterpreted the quotations on page 20 of the brief for the petitioner from House Report No. 851, 63rd Congress, 2nd Session, pages 18 and 20. The reluctance expressed in this report was directed specifically to those sections of the Act of 1915 which were to be extended to foreign vessels, i.e., Sections 4, 11 and 14. The quotations on page 20 of petitioner's brief related to Section 4 of this Act dealing with half wages, which has been quoted above, and can in no way be interpreted to mean that these members of Congress thought that all 20 of the Sections of the Act of 1915 were to be applied to foreign vessels. The language of this report and the language of the Act permit no such interpretation.

7. Plaintiff-respondent's citations of admiralty decisions taking jurisdiction over disputes between aliens (pp. 24-29 of plaintiff-respondent's brief) ignore the jurisdictional requirements which a plaintiff must plead and prove in an action at law in a United States District Court.

The record contains a pleading of the Jones Act (6) and proof that plaintiff-respondent signed articles in New York (16, 24, 44).

There is neither pleading nor proof of such diversity of citizenship as would be required to sustain the jurisdiction of the District Court if the Jones Act were not applicable (28 U. S. C. § 1332).

Furthermore, absent the Jones Act, the Court will enforce the law of the flag since the contract of employment was a Danish contract and so remained throughout. The place

where plaintiff-respondent shipped or reshipped is of no moment whatsoever. *The Hannah Nielsen,* 273 F. 171, 172 (2nd Cir. 1921).

8. Plaintiff-respondent attempts to distinguish *The Paula,* 91 F. (2d) 1001, 1937 A. M. C. 988 (2nd Cir. 1937), cert. den. 302 U. S. 750, 58 S. Ct. 270, on pages 11, 36 and 58 of his brief on the grounds that the libel was only *in rem* without disclosing that the libel in *The Paula* was both *in rem* and *in personam,* 91 F. (2d) 1001, 1937 A. M. C. 989.

9. *The Titanic,* 233 U. S. 718, 34 S. Ct. 754, 58 L. Ed. 1171 (1913), cited on page 29 of plaintiff-respondent's brief, held only that a foreign shipowner who was sued in the United States was entitled to the benefits of the United States statutes limiting his liability, such statutes having been made *specifically applicable* by their terms to foreign, as well as to American shipowners. The holding of this Court was that the foreign shipowner was entitled to the limitation of liability conferred upon him by the statute, but the holding was not that the application of our laws was any broader than the explicit language of the statute.

10. Counsel for plaintiff-respondent cites and quotes from *Uravic, Admnx. v. F. Jarka Company, Inc.,* 282 U. S. 234, 51 S. Ct. 111, 75 L. Ed. 312 (1931), on page 32 of his brief. This case is hardly in point since it involved a question of liability for causing the death of an *American* citizen employed as a longshoreman by a Delaware corporation and working "momentarily" aboard a German vessel in the port of New York. This Court was clearly dealing with an event within the territorial jurisdiction of the United States. Mr. Justice Holmes made this clear on page 240, when he stated as follows:

> "It always is the law of the United States that governs within the jurisdiction of the United States, even when for some special occasion this country adopts a foreign law as its own. * * * It would be extraordinary to apply German law to Americans momentarily on board of a private German ship in New York."

11. The articles here were valid. While the articles such as were signed by Larsen would, according to plaintiff-respondent, be invalid as applied to an American crew signing on an American vessel in American waters, still it has never been contended or held that the statutes relating to the form of articles should apply as well to foreign vessels, such as the s/s Randa, signing on foreign seamen in American ports. This is in recognition of the fact that there are certain matters which should more properly be left to be dealt with by the provisions of the law of the flag of the vessel. The inability of the plaintiff-respondent to find any authority for his suggestion that the articles herein were invalid is explained by the fact that although the initial section dealing with the form of articles (§ 1 of the Act of March 4, 1913, C. 141, 37 Stat. 736, Title 46, U. S. C. § 564), which had its origin in Section 4511 of the Revised Statutes of 1873, uses the expression "every vessel", yet Section 1 of the Act of March 4, 1915 (C. 153, 38 Stat. 1164, Title 46, U. S. C. § 569), which had its origin in Section 4516 of the same chapter of the Revised Statutes of 1873, states that in cases of desertion or casualty, the master must ship sufficient replacements "and report the same to the United States consul at the first port at which he shall arrive". This clearly points its application to the masters of only United States vessels.

The only case cited by counsel for plaintiff-respondent in support of his position on the invalidity of the articles signed is *The Quoge*, 261 Fed. 414, aff'd 266 Fed. 696 (4th Cir. 1920). This case is clearly inapplicable to the point, since it dealt with the validity of articles to serve aboard an American vessel, which articles were, of course, required to conform to the appropriate United States statutes.

To the contrary is *The Hannah Nielsen*, 273 F. 171 (2 Cir., 1921), which gave effect to Norwegian articles signed in the port of Portland, Maine.

12. The case of *Arthur* v. *Compagnie Generale Transatlantique*, 72 F. (2d) 662 (5th Cir. 1934), finds no parallel

application to the case at bar, since it involved an injury to a stevedore temporarily aboard ship while discharging cargo in the harbor of Cristobal, Canal Zone, which is, of course, within the territorial jurisdiction of the courts of the United States.

13. Plaintiff-respondent cites *Stewart* v. *Pacific Steam Navigation Co.*, 3 F. (2d) 329 (S. D. N. Y. 1924), on page 36 of his brief. This case apparently involved an action under the Jones Act between an *American* seaman and a corporation organized outside the United States. This finds support in the following language of Judge Learned Hand at page 329:

> "There is no indication of any purpose to limit it to United States corporations, and it would be highly unreasonable to impute any such purpose to Congress, for the result would be, not only to deprive *American seamen of the protection which the Act was meant to give them when serving on foreign ships*, but to give advantage to such ships as against American ships."

That case did not present an all-foreign question such as is presently before this Court.

14. As has been pointed out above, counsel for plaintiff-respondent and counsel for *amici curiae*, submitting briefs on his behalf have set up a straw man of a foreign seaman signing articles on a ship owned by Americans, but operated under a foreign flag. In this connection it is interesting to note that both plaintiff-respondent and the brief of *amici curiae* on behalf of the "Friends of Andrew Furuseth Legislative Association" cite *Gerradin* v. *United Fruit Co.*, 51 F. (2d) 417, aff'd 60 F. (2d) 927 (2nd Cir. 1932), certiorari denied 287 U. S. 642. In that case the Jones Act was held applicable to a seaman injured on board a Honduran ship, but owned by a New York corporation and demise chartered to defendant, a New Jersey corporation. The Court held that the ownership by American citizens was pivotal and wrote as follows at page 929:

> "There can be no doubt about the power of Congress to impose liability *upon its own citizens* for acts done on the high seas or at other places outside its territorial jurisdiction. American Banana Co. v. United Fruit Co., 213 U. S. at page 356, 29 S. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047. Section 33 of the Merchant Marine Act (46 U. S. C. A. § 688) has done this in the case of American citizens who own ships on which seamen are injured through their negligence, and it seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a shipowner who bears such an illusory shield." (Emphasis supplied.)

The rule established by this case adequately provides for cases of foreign flags being used as smokescreens for true ownership.

That the courts will pierce the corporate veil is shown in *Central Vermont Co. v. Durning*, 294 U. S. 33, 55 S. Ct. 306, 79 L. Ed. 741 (1935), where a Maine corporation was engaged in operating a steamship line on Long Island Sound between New London, Connecticut and New York City, employing vessels built in the United States and documented under our laws. All the Maine corporation stock, with the exception of directors' qualifying shares, was held by a Vermont corporation, all of whose stock in turn, with the exception of directors' qualifying shares, was held by the Canadian National Railway Co., a Canadian corporation. This Court held that the American vessels were not owned by persons who were citizens of the United States within the provisions of Section 27 of the Merchant Marine Act of 1920 forbidding coastwise transportation of merchandise on foreign vessels.

Such is not the case here. Plaintiff-respondent nowhere raised the issue that petitioner was an American citizen, but based his claim for recovery solely on the fact that he signed articles within the United States. Plaintiff has the burden of proof as to the jurisdiction of the court, i.e., by proving diversity of citizenship or by coming within the

Jones Act. He has not sustained this burden. Judgment in his favor should be reversed, and the complaint dismissed.

15. *O'Donnel* v. *Great Lakes Co.*, 318 U. S. 36, 63 S. Ct. 488, 87 L. Ed. 596 (1943), cited by plaintiff-respondent on page 37 of his brief, applied the Jones Act as the law of the flag of the ship, since this was the applicable law rather than the law of the port of call. This, of course, is totally in accord with petitioner's position herein.

16. With respect to *Gambera* v. *Bergoty*, 132 F. (2d) 414, 1943 A. M. C. 45 (2nd Cir. 1942) certiorari denied 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699, the plaintiff-respondent has only told half the story in stating on page 38 that relief was afforded "to a foreign seaman". This case was fully discussed in the brief for the petitioner on pages 52 and 53, wherein it was pointed out that the libelant Gambera, far from being a foreign seaman, had in fact resided in the United States for 23 years, had served in the United States Army for two years, and had even filed his first papers for naturalization as a United States citizen.

17. The decisions in *Kyriakos* v. *Goulandris*, 151 F. (2d) 132, 1945 A. M. C. 439 (2nd Cir. 1945), and *Taylor* v. *Atlantic Maritime Co.*, 179 F. (2d) 597, 1950 A. M. C. 352 (2nd Cir. 1950), cert. den. 341 U. S. 915, 71 S. Ct. 736, 95 L. Ed. 1350, have already been dealt with fully in petitioner's main brief.

18. On pages 57 and 58 of his brief, plaintiff-respondent alleges that the case of *Thompson Towing & Wrecking Association* v. *McGregor*, 207 Fed. 209 (6th Cir. 1913) nullified petitioner's *lex loci delictus* argument. Plaintiff-respondent does not, however, justify such a conclusion. This was an appeal from a decree entered in a proceeding to limit liability respecting a boiler explosion on a United States lighter, which resulted in the instant death of one man on board the vessel, and in permanent injury to Mc-

Gregor, both of whom were members of her crew. This explosion occurred in an arm or bay of Lake Huron in Canadian territorial waters. McGregor and the administratrix of the deceased commenced separate suits in the County Court of Michigan to recover damages for the permanent injuries and death mentioned. With respect to the question of the application of Michigan or Canadian law, Judge Warrington wrote as follows (at page 215):

> "Concededly the state suit was begun within the time fixed by the Michigan death statute. Can the right of action in terms preserved to the widow by that statute be enforced? If so, it is because at the time of the death the Stewart was through ownership and registration domiciled in Michigan and was, as respects the enforcement of such a right, part of the territory of Michigan. So far as this question is concerned, the ultimate basis of the decree was 'that the explosion of this boiler was a matter which did not directly involve the "peace, dignity, or tranquility" of the Canadian government, but rather involved the "internal discipline and management" of the ship.'"

In holding that the liability of the vessel for the death and injury was governed by the Michigan law, the court subscribed to the language found in *United States* v. *Rodgers*, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893), wherein Mr. Justice Field wrote as follows (at p. 260):

> "The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquility, in which case it may assert its authority."

Far from nullifying petitioner's argument as to the *lex loci delictus*, this case fully supports petitioner's position both with respect to that rule and with respect to the application of the law of the flag to matters involving only "the internal discipline and management" of the vessel.

19. On page 60 of plaintiff-respondent's brief under the heading "Conclusion" it is stated that "the real point at issue is not the intent of Congress in passing this Act, but the power of this great country, acting through its judicial arm, to protect itself against foreign vessels that, by indirection and misapplication of a rule not finding international acceptance, assume all the benefits and prerogatives of American vessels while at the same time callously avoid the disabilities and liabilities which should attend the assumption of such benefits under our flag." This conclusion epitomizes the misapprehension under which the plaintiff-respondent is laboring. The petitioner has never contended, and has taken great pains to point this out from time to time during the course of this proceeding, that Congress did not have the power to legislate with respect to certain aspects of foreign vessels calling at United States ports.

If Congress had said with respect to Section 20 of the Merchant Marine Act of 1915, as amended, that "the provisions of this section shall be applicable to foreign owners signing on alien seamen in any port of the United States", then your petitioner would not now be before this Court. The reason why the petitioner appealed from the rulings of the Trial Court and petitioned for certiorari from the ruling of the Court of Appeals is that the Jones Act, as written by Congress, contains no such provision and does not state that it was to be applied to foreign vessels under any conditions whatsoever.

It is respectfully submitted that neither this Court, nor any other United States court has the power to extend an act of the Legislature beyond its clearly intended scope. The functions of our courts are, under the Constitution, judicial and not legislative. If Congress intended the provisions of the Jones Act to apply to a set of facts such as are here presented to this Court, then the language of the Act falls short of accomplishing that intent. The remedy, if a remedy is deemed desirable, lies in the legislative power of Congress.

CONCLUSION

The judgment below should be reversed.

Dated, New York, December 31, 1952.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

DAVID P. H. WATSON,
of Counsel.